Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

RANDALL W. HANSEN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the "Responsible Corporate Officer" Doctrine Permits Felony Conviction of Individual Corporate Officers for "Failure to Detect" Violations Under Environmental Statutes for Which Congress Required Proof of Actual Knowledge.

II. Whether a "Responsible Corporate Officer" Jury Instruction May Permit Conviction for "Knowing Endangerment" Under 42 U.S.C. §§ 6928(e) and (f) Without the Statutorily Required Jury Finding that the Individual Corporate Officer was Actually Aware or Actually Believed that His Conduct was Substantially Certain to Place Others in Imminent Danger of Death or Serious Bodily Injury.

III. Whether Purely Intra-Corporate Discussions and Decision-Making can Satisfy the Plurality Requirement for Conviction of Individual Corporate Officers for Felony Conspiracy under 18 U.S.C. § 371.

PARTIES TO THE PROCEEDING

I. Petitioner

Randall W. Hansen

II. Respondents

United States of America
Christian A. Hansen (expected to petition separately)
Alfred R. Taylor (expected to petition separately)

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PETITION FOR A WRIT OF CERTIORARI

Randall W. Hansen hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. 1a-63a) is reported at 262 F.3d 1217.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 2001. The court of appeals denied a timely petition for rehearing on October 26, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved are the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6928(d)(2), (e), & (f), the Clean Water Act, 33 U.S.C. § 1319(c)(2)(A), and the federal conspiracy statute, 18 U.S.C. § 371. Pertinent portions of these statutes are reproduced in Appendix D, 68a-74a.

STATEMENT OF THE CASE

Introduction. Criminal penalties are undeniably an important weapon in the government's environmental enforcement arsenal. With this case, however, the balance between the need for strong environmental enforcement and fundamental principles of criminal jurisprudence has tipped radically askew. In upholding the conviction and four-year prison sentence of Randall Hansen, who learned of the environmental violations at issue, in the district court's words, "after the fact," R14-235-6, the Eleventh Circuit has further complicated an already opaque morass of opinions variously attempting to define the point at which business decisions

become felonious criminal conduct under the "responsible corporate officer" doctrine.[1]

This case presents the Court with an opportunity to clarify the parameters of the doctrine of vicarious "responsible corporate officer" criminal liability as it has evolved since *United States v. Dotterweich*, 320 U.S. 277 (1943), and *United States v. Park*, 421 U.S. 658 (1975). At the same time, it permits review of the related issue of intra-corporate conspiracy liability under 18 U.S.C. § 371, which, though tolerated by numerous lower courts, recent legal scholarship has called seriously into doubt.[2] No previous case, to petitioner's knowledge, has presented these broad issues so squarely,[3] nor has the misapplication of the relevant doctrines led to so profoundly unjust a result for an individual petitioner.

The troubling outcome in this case had its genesis in a jury instruction that permitted conviction of Mr. Hansen for serious felonies under the Resource Conservation and Recovery Act (RCRA) based on the fact of his corporate position and a

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[1] *See, e.g.*, Jason Blacksberg *et al.*, *Environmental Crimes*, 38 Am. Crim. L. Rev. 607, 617 (2001) (surveying circuit decisions: "[t]he degree to which the responsible corporate officer doctrine eliminates the *mens rea* requirement of various environmental statutes is not well settled.").

[2] *See generally* Shaun P. Martin, *Intracorporate Conspiracies*, 50 Stan. L. Rev. 399 (1998) (comprehensively and critically examining the federal judicial response to the doctrine of intracorporate conspiracy).

[3] *Cf. Hanousek v. United States*, 528 U.S. 1102 (2000) (denying certiorari on the question whether a misdemeanor conviction under the Clean Water Act's criminal *negligence* provisions violated the defendant's due process rights). Dissenting from the denial of certiorari, Justice Thomas, joined by Justice O'Connor, noted that "[w]hatever the merits of petitioner's underlying due process claim, . . . it is erroneous to rely, even in small part, on the notion that the CWA is a public welfare statute." *Id.* (Thomas, J., dissenting). The dissent noted that the circuits were split on this issue, arguing persuasively that the Court should "further delineate [the] limits" of the public welfare doctrine. *Id.*

"failure to detect" the violations at issue. The district court erroneously applied the mere "failure to detect" standard not only to RCRA's basic felony of treating, storing, or disposing of hazardous wastes without a permit (which itself requires proof of actual knowledge of the facts constituting the violation), but also to its "knowing endangerment" provision, which has enhanced scienter requirements and concomitantly enhanced penalties, including up to fifteen years in prison. This standard completely subverted Congress' explicit intent to punish as knowing endangerment only the most culpable, egregious, life-threatening conduct. By contrast, the district judge himself summarized Randall Hansen's supposedly culpable conduct as a "lack of action, *whether intentional or unintentional*." R14-235-8 (emphasis added).

Under the "responsible corporate officer" doctrine as applied here, any CEO would be criminally liable for all environmental violations, known or unknown, that occurred within the realm of his or her corporate employer. Compounding this legal error, the courts vastly overextended the criminal responsibility of corporate officers by simultaneously *rejecting* the precept of corporate unity in converting intra-corporate management discussions into a supposed "conspiracy" to continue operating the bankrupt company's Georgia plant. This created a truly slippery slope because the jury was in turn permitted to convict petitioner for substantive offenses committed by alleged "coconspirators" under *Pinkerton v. United States*, 328 U.S. 640 (1946). The interrelated nature of these issues—"responsible corporate officer" and "intra-corporate conspiracy"—suggests the wisdom of simultaneous review, though either issue standing alone would warrant the Court's attention.

The Indictment. In 1998, a federal grand jury sitting in the Southern District of Georgia, Brunswick Division, returned a 42-count indictment against petitioner Randall Hansen, charging him with violations of the federal conspiracy statute, 18 U.S.C. § 371 (count 1); the Clean Water Act, 33 U.S.C. § 1319(c)(2)(A) (CWA) (counts 2-21); and RCRA, 42 U.S.C.

§§ 6928(d)(2)(A) and (e) (counts 22-34). App. 13a-14a.[4] The allegations in the indictment arose from the operation, primarily in 1993 through February 1, 1994, of a chlor-alkali plant in Brunswick, Georgia, owned by LCP Chemicals (LCP), a division of Hanlin Group, Inc. (Hanlin). R1-1-2. During this period, Randall Hansen served—from the company's headquarters in New Jersey—as its Executive Vice President and, beginning in April 1993, as its interim Chief Executive Officer (CEO). App. 2a; GX1-2c. Also indicted were petitioner's father, Christian Hansen, founder and former Chairman and CEO of LCP; Alfred Taylor, the Brunswick plant manager; and Brent Hanson, the plant's environmental manager.[5] R1-1-3; R16-95; App. 13a-14a. None of LCP's four corporate-level environmental officers was charged. R20-50-51.

The CWA counts (2-21) alleged that the defendants, on various occasions, "knowingly" discharged mercury and chlorine in excess of the amounts allowed by the plant's National Pollutant Discharge Elimination System (NPDES) permit. R1-27-31. The first eleven RCRA counts (22-33) alleged that the defendants "knowingly" treated, stored, and

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[4] Petitioner was not charged under counts 35-41, which alleged reporting violations under the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. § 9603(b)(3) (CERCLA). R1-37-39. At the close of the evidence, the district court entered judgment of acquittal on count 42, which alleged the criminal "taking" of the wood stork under the Endangered Species Act, 16 U.S.C. §§ 1538(a)(1)(B), 1538(g) and 1540(b)(1) (ESA). App. 14a.

[5] Brent Hanson, no relation to Randall Hansen, pled guilty to count 41, a CERCLA offense not charged against petitioner, and count 42, the ESA offense dismissed at the close of the case. App. 14a. Former employees with operational responsibilities at the Brunswick plant entered into plea agreements and later testified for the government. App. 13a, n.14. In exchange for testimony, the government immunized other corporate-level officers, including James Mathis, former Chairman of the Environmental Committee of LCP's Board of Directors. R19-172-73; R19-133.

disposed of hazardous waste without a permit. R1-31-36.[6] Various factual nuances colored each RCRA count as to the specific manner and dates of the alleged illegal treatment, storage, or disposal. For example, counts 22 and 23 alleged that, from May 29 through November 14, 1993, and again from November 15, 1993, through February 1, 1994, the defendants "cause[d] the disposal of hazardous waste" (*e.g.*, mercury contaminated wastewater) by allowing it to seep through holes, cracks, and gaps in the plant's cell room floor, "thereby causing the identified hazardous wastes to flow into and on the land and into the groundwater beneath" the floor. R1-31-32.

The last RCRA count (34) charged Randall[7] with knowing endangerment, alleging that he "knowingly" treated, stored, and disposed of hazardous waste without a permit, while "knowing at that time that such unpermitted treatment, storage and disposal thereby placed Hanlin employees and other persons in imminent danger of death and serious bodily injury . . . ." R1-36-37. When, in 1980, Congress enacted RCRA's knowing endangerment provisions with substantially enhanced criminal penalties, it defined this crime narrowly and precisely, with a clear expectation that the statute would be invoked sparingly, in "the occasional case where the defendant's knowing conduct shows that his respect for human life is

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[6] RCRA provides a range of administrative, civil, and criminal penalties by which the government may enforce the Act's restrictions on the handling of hazardous wastes. 42 U.S.C. § 6928. Under Section 6928(d)(2)(A) RCRA provides for felony criminal penalties (up to five years in prison) against any person who "knowingly treats, stores, or disposes of any hazardous waste" without a permit. RCRA also proscribes a number of other acts, not charged in this case, with penalties ranging from two to five years of imprisonment. *See, e.g., id.* § 6928(d)(3) (for knowingly making false statements in connection with reporting obligations under RCRA).

[7] Given the number of similar surnames in this case, we informally refer to petitioner, as did the court of appeals, by his first name.

utterly lacking and it is merely fortuitous that his conduct may not have caused a disaster." H.R. Conf. Rep. No. 96-1444, at 38 (1980), *reprinted in* 1980 U.S.C.C.A.N. 5019, 5038.[8]

The case against Randall Hansen stands in stark contrast to virtually all prior RCRA and CWA prosecutions.[9] Here, there was no evidence or allegation that he personally dumped or discharged hazardous wastes into the environment, or that he ordered a corporate agent to do so. Similarly, the case involved no evidence that he failed to report violations to the government or mislabeled containers of waste materials to deceive inspectors (two recurrent fact patterns in environmental prosecutions) or caused such violations. Nor did he turn a blind eye: "Randall attempted to find additional funds [for plant repairs] by selling excess equipment and reducing the payroll but the funds remained limited." App. 6a. Instead, the case against Randall, as the

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[8] The Ninth Circuit recently affirmed a conviction for RCRA knowing endangerment where the defendant personally ordered his employees to clean out tanks containing cyanide residue, repeatedly refusing their requests for protective gear, and causing the near death of one. *United States v. Elias*, 269 F.3d 1003 (9th Cir. 2001).

[9] *See, e.g.*, *United States v. Eidson*, 108 F.3d 1336, 1340 (11th Cir.) (one defendant gave another "permission to have the driver dump the contents of the truck into the sewer"), *cert. denied*, 522 U.S. 899 (1997); *United States v. Greer*, 850 F.2d 1447, 1450-52 (11th Cir. 1988) (defendant directly ordered illegal dumping); *United States v. Laughlin*, 10 F.3d 961, 963 (2nd Cir. 1993) (defendant first "began to demand repeatedly that [agent] release the contents of the tanker car onto the ground," and then, when agent refused, personally "released the entire contents of the tanker car directly onto the ground"); *United States v. Weitzenhoff*, 35 F.3d 1275, 1282 (9th Cir. 1994) (defendants "instructed two employees at the plant to dispose of [sludge] on a regular basis by pumping it from the storage tanks . . . directly into the ocean"), *cert. denied*, 513 U.S. 1128 (1995); *United States v. Sellers*, 926 F.2d 410, 412 (5th Cir. 1991) (defendant personally dumped sixteen 55-gallon drums of paint waste onto creek embankment); *United States v. Hoflin*, 880 F.2d 1033, 1035 (9th Cir. 1989) (defendant "instructed an employee to haul the paint drums to the sewage treatment plant and bury them").

government argued both at trial and on appeal, arose from his alleged "complicity" in LCP's corporate decision to continue operating the Brunswick plant until February 1, 1994. The government essentially contends that, because the plant repeatedly reported environmental violations during the year prior to its closure, without adequate funds for repairs and maintenance at the plant to prevent the violations, Randall, as CEO, should have caused the company to shut down the plant sooner.

Count 1, for conspiracy, encapsulated the government's theory of the case against Randall, alleging, *inter alia*, that he and his codefendants, "[a]s part of the conspiracy, . . . continued to operate the Brunswick facility in such a manner as to continue the disposal of these hazardous wastes without expending adequate funds to maintain and repair the floors of the cell room buildings so as to prevent the disposal of such hazardous wastes into the environment." R1-11.

Randall Hansen's Brief Tenure at LCP. After graduating from Harvard Business School in 1985, Randall joined the Boston consulting firm of Bain & Company, but later, at his father's urging, left to devote his talents to Hanlin's business, which faced considerable financial problems. GX 1-2c. In 1991, before LCP hired Randall as Executive Vice President, Hanlin, the parent corporation, filed a voluntary bankruptcy petition under Chapter 11, with pre-petition obligations exceeding $100 million. App. 6a. The company remained in bankruptcy throughout the relevant period. At all relevant times, the bankruptcy code restricted management's ability to allocate the estate's assets, or assume new debts, for maintenance, repairs, and environmental compliance. *Id.*; 11 U.S.C. §§ 363(c)(1), 363(b)(1) & 364. Furthermore, the "ultimate decision-making for all major projects, capital and extraordinary expenditures," including whether to shut down or cease operations at any plant, "were subject to the approval of the Board [of Directors] and the bankruptcy creditor's committee and court." App. 6a; SRII-7.

LCP's parent had purchased the Brunswick plant in 1979 from Allied Chemical. App. 2a. During the relevant time period, Randall visited the Brunswick plant on only two occasions (App. 7a-8a.), working principally out of his office in New Jersey on the company's intractable financial problems. The court of appeals concluded that Randall's "primary focus was financial and, with the support of the bankruptcy creditor's committee and court, he sought to sell the company to a responsible party who could operate the business and have the financial resources to deal with the various environmental conditions." App. 9a. At the same time, LCP's outside environmental counsel—the law firm of Dechert, Price & Rhoads in Philadelphia—actively pursued negotiations with the United States Department of Justice (DOJ), the Environmental Protection Agency (EPA), and the Georgia Environmental Protection Division (EPD) regarding LCP's acknowledged compliance problems. App. 6a; GX 10-7j & 10-7L; SRII-4. One 1992 report advised Randall and others, including at least one Board member:

> On August 19th, [1992,] a letter from [DOJ] was sent to both our environmental and bankruptcy attorneys. The DOJ now seems to understand that Hanlin Group does not have the financial resources to pay for all the fines assessed, consent order and permit obligations forced upon it by regulatory authorities. They are requesting that Hanlin develop an action plan and present it to the DOJ, et al for review, comment and implementation. Data is now being gathered and a strategy will be developed.

GX10-7j. Management at the Brunswick plant regularly reported the NPDES permit exceedences to the Georgia EPD in monthly correspondence from January 1993 until the plant closed on February 1, 1994. GX13-2v-2jj.[10] In April 1993,

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[10] Despite the ongoing reporting to, and negotiations with, federal and state authorities, EPA never exercised its statutory authority under RCRA

Randall sought to resign, but was persuaded to stay on by the Board and creditors committee who urged him to remain to complete the sale of the business. R21-200-201.

Despite numerous permit violations for the year to date, on October 30, 1992, the Georgia EPD renewed the plant's multi-year permit; but then in the summer of 1993 initiated proceedings to revoke the renewed permit for noncompliance. GX 13-1b; App. 10a. LCP filed an appeal, staying the revocation. App. 12a. The EPD ultimately also sought a TRO in state court to order the plant closed. *Id.* By then, however, a deal was reached to sell the plant back to its former owner, Allied Signal, and another investor, Holtrachem, which agreement obligated the purchasers to make a multimillion-dollar advance investment in improvements at the Brunswick plant; the buyers immediately began to advance the funds, *prior to* the deal's closing, "to the Brunswick plant for purchase of critical parts and equipment to improve operating reliability and environmental compliance." SRII-2(B). *See also* GX 10-6; App. 12a.

With that context, the creditor's committee pressured everyone concerned to keep the plant open and allow the Allied deal to close, specifically warning of the environmental hazards inherent in any plant closure, particularly where funds were limited. On November 30, 1993, the creditor's committee wrote to the state judge in the proceedings initiated by the Georgia EPD to warn her of the "likely consequences that would result from any closing of the Brunswick plant," which would require expenditure of "considerable amounts of money . . . to avoid the poss-

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to seek an injunction of continued operation of the Brunswick plant because it presented an "imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6973(a) (1994 ed.). Nor did the Occupational Safety and Health Administration, after inspecting the plant in 1992, take any action beyond levying minor fines and requiring corrective action, which LCP promptly implemented. App. 5a; GX 10-7i.

ibility of an environmental catastrophe." App. 12a, n. 12. Government witnesses admitted at trial that shutting off a chlor-alkali plant's power without properly decommissioning it would cause "the [mercury] cells [to] cool off, the joints [to] open up, and you would get additional mercury leakage"; that "you can't just turn off the switch and leave and not expect some dramatic consequences"; that one "would expect to see additional settling and cracking [in the cell room floors] and buildup of fluids [on the floors] after a plant shut down"; and that one generally "would expect the conditions at the plant to possibly worsen after the shutdown." R20-147; R19-73, 76, 83-84. On December 1, 1993, the Board "concluded that it should not shut down the plant until further information developed because of the fact that a plant shut down may exacerbate other environmental problems and may prevent the acquisition by Allied and Holtrachem which [were] currently funding the plant upgrade and site remediation." SRII-1.

On December 6, 1993, the state judge, counsel for EPD, and representatives of LCP, Allied, and Holtrachem personally inspected the plant. GX13-4; SRII-5; R20-302-03. Back in court later that day, counsel for EPD complimented LCP's "extraordinary efforts" to improve the facility, and withdrew the TRO request to close the plant. SRII-5. In the end, however, "the purchase agreement [with Allied] . . . fell through and shortly thereafter the facility closed. After the plant closed, Randall . . . requested $1,500,000 in additional funds from the bankruptcy court to deal with the environmental impact of closing but the request was denied." App. 12a.

The government's principal witness at trial testified that Randall was "just as concerned as we [plant workers] were" about conditions in the plant. App. 8a. Moreover, "[the plant manager] stressed safety and strict adherence with LCP's training and safety programs, and assured employees the right to refuse to perform any activity if the employee felt it to be

unsafe." *Id.* In terms of actual injuries from plant conditions, the government proffered testimony from one former plant employee who once fell into a sump containing caustic wastewater; he admitted that he showered off, returned to work, and did not even report the incident to the plant nurse. App. 5a, n.6; App. 29a; R19-231. Nor did he even recall the decade in which the incident occurred. *Id.*[11]

The Verdict and Sentencing of Randall Hansen. The jury nonetheless returned a guilty verdict against petitioner on counts 1-34—including knowing endangerment, which trebled the base offense level under the Federal Sentencing Guidelines. On June 2, 1999, the Honorable Anthony A. Alaimo, Senior United States District Judge for the Southern District of Georgia, who presided over the trial, began the defendants' sentencing hearing by calling it "one of the most difficult days I have experienced since being on the bench for well-nigh thirty years." R22-229-2. The district court then sentenced Taylor to serve 78 months of incarceration, and petitioner's father to serve 108 months of incarceration and to pay a $20,000 fine. App. 14a. The court also began con-

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[11] As evidence of hazards at the plant, the Eleventh Circuit's opinion refers to this incident as well as a NIOSH study of mercury levels in employees, prepared in 1987 and 1988, years before Randall was hired as CEO of LCP. App. 20a-22a. At trial there was no hint even that Randall had ever heard of the incident or the report. The court's implicit suggestion that a CEO is aware of findings and conclusions in every document in the company's files is the very essence of constructive knowledge. Indeed, on cross-examination of Randall, the government actively and prejudicially sought to establish such constructive knowledge by questioning him on the contents of a company document dated 1981, when he was an undergraduate at Vanderbilt University. R21-203-04 (prosecutor: "you heard the evidence [during trial] about *the corporate knowledge that your company had* about the existence of this glob underneath the cellroom back in 1981 ..."); R21-205 (prosecutor, referencing 1987 document: "Doesn't that indicate that, *institutionally,* LCP was well aware of what was happening under cell building #1?") (emphasis added).

sideration of petitioner's sentencing, noting the outpouring of glowing supportive letters from his friends and associates, including Hugh Croom—the Brunswick plant manager and government's first witness at trial. R28-248-75. The court then abruptly deferred ruling on Randall's sentence, stating "if I knew of an appropriate way to really depart, I would do so." R28-248-78.

On July 1, 1999, at the reconvened sentencing hearing, the court summarized the evidence against Randall by observing that Randall "was never directly involved in the discharging or dumping of hazardous waste, nor did he order such conduct to take place." R14-235-12. The court found that Randall's responsibilities within LCP gave him "knowledge [that] concerned itself more with the financial aspects of the corporation and not the day-to-day operations of the various chlor-alkali plants opened by the Hanlin Group." R14-235-5. The court further found that LCP's "willful violation[s] of the EPD permits were done without [Randall's] prior consent or knowledge." R14-235-13. The court then characterized the case against Randall as essentially one of negligence, finding that he "failed to act in an appropriate and reasonable manner when various violations were reported to him," but that "he was notified of these violations after the fact. And his failure to act in a reasonable manner caused further harm to the environment." R14-235-6. As for the alleged knowing endangerment of plant employees, the court stated: "Mr. Randall Hansen's lack of action, *whether intentional or unintentional*, seriously placed the workers at LCP and this community in danger." R14-235-8 (emphasis added).[12]

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[12] Not only is negligence an insufficient basis for conviction of these crimes, Congress specifically considered and rejected a House proposal based on the concept of "reckless endangerment" during the conference on RCRA's knowing endangerment provisions. *See* H.R. Conf. Rep. No. 96-1444, at 37 (1980), *reprinted in* 1980 U.S.C.C.A.N. at 5037.

After making reductions to the offense levels but denying Randall's request for a downward departure under Chapter 5 of the Federal Sentencing Guidelines, the court then sentenced Randall to serve 46 months of incarceration and to pay a $20,000 fine. App. 14a, 59a; R14-235-12-13.

The District Court's Instructions to the Jury. The instructions in this case explain how the jury could have found Randall guilty on this record. After initially instructing the jury on the elements of the substantive CWA and RCRA offenses, eight transcript pages later the court read a "responsible corporate officer" instruction—to which trial counsel for petitioner and his codefendants made several objections—which articulated an alternative basis for conviction and effectively dispensed with the statutory *mens rea* elements of 42 U.S.C. §§ 6928(d)(2)(A), (e), and (f)[13]:

> Now each Defendant under consideration may be found guilty of Counts 22 through 34 of the Indictment if you find that the Government has proven the following beyond a reasonable doubt:
>
> First, that the Defendant under consideration had a responsible relationship to the violation—that is, that it occurred under his area of authority and supervisory responsibility;
>
> Second, that the Defendant had the power or capacity to prevent the violation; and

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[13] The court gave the "responsible corporate officer" instruction by listing elements—just like elements of a substantive crime—of responsible corporate officer liability in the same numerical, sequential manner as is normally done ("First, . . . Second, . . . Third, . . ."), and as the court had done, when giving its conspiracy, CWA, and original RCRA instructions. *See, e.g.*, CWA (R22-189-90), and RCRA (R22-191-92). The plain meaning was that the jury need consider only the three listed responsible corporate officer "elements" in deciding whether to convict or acquit petitioner of counts 22-34 under RCRA. The written instructions are reproduced at Appendix E, 75a-98a; the transcript of the oral instructions appears at R22-171-209.

> Third, that the Defendant acted knowingly in failing to prevent, detect or correct the violation.

R22-200; App. 95a (hereinafter the "responsible corporate officer" instruction). The government had submitted this proposed jury instruction, titled "Intent—Responsible Individual Instruction (RCRA)," before trial, and cited *Dotterweich* and *Park* for support. R6-106-56; *see* Appendix F, App. 99a-100a.

Earlier in the charge, the court read to the jury the standard definition of "acted knowingly," which appears in the third element of the "responsible corporate officer" instruction:

> Now with respect to the remaining counts of the Indictment—that is, those other than the conspiracy count—the Government must prove that each Defendant under consideration acted knowingly. In that regard, a person acts knowingly if he acts intentionally and voluntarily, realizing what he is doing, and not because of ignorance, mistake, accident, or carelessness. . . .

R22-187-88; App. 85a. Read together with the "responsible corporate officer" instruction, this instruction thus permitted the jury to convict Randall of any RCRA offense (and likely the charged CWA offenses as well) based on a finding that he consciously went about performing his job in the ordinary course of business, but failed to detect the violations. This simply is not, has never been, and certainly should not be, the standard applicable to environmental felonies requiring actual knowledge.

Proceedings in the Court of Appeals. On appeal, petitioner challenged his conviction based, *inter alia*, on the sufficiency of the trial evidence to support his conviction on all counts (1-34), and the error in the district court's "responsible corporate officer" instruction. Petitioner argued that the district court had extended the *Dotterweich* and *Park* "public welfare" concept to felony offenses under RCRA without requiring proof of their statutory *mens rea* elements. On August 31, 2000, approximately two weeks before the

scheduled oral argument, the panel requested that the government make a supplemental filing that, "with respect to *each* of the Appellants," set forth record citations to the evidence for each material element of each separate offense. At oral argument, the panel ordered the government to clarify and resubmit the requested supplemental filing consistent with its initial instructions.

On August 24, 2001, in a 74-page *per curiam* opinion, the panel affirmed the convictions of Christian Hansen, Taylor, and petitioner in all respects. In a highly disjointed discussion of the various challenges to the jury instructions, the panel devoted just two sentences to the district court's instruction that the jury could convict petitioner of knowing endangerment on a "responsible corporate officer" theory:

> As to Count 34, RCRA's knowing endangerment provision also requires proof that the hazardous waste violation placed persons in "imminent danger of death or serious bodily injury" and that the defendant had knowledge of that danger. 42 U.S.C. § 6928(e). Because the instructions clearly set forth that a finding of "acted knowingly" was required for a conviction, there was no error in the instruction.

App. 53a-54a. The second sentence, a confounding non sequitur to the first, now stands as the law of the Eleventh Circuit, in one of the first published appellate decisions to interpret the definition of knowing endangerment under RCRA.

The panel also affirmed petitioner's conviction for an exclusively intra-corporate "conspiracy" under 18 U.S.C. § 371:

> The evidence showed that the defendants admitting [sic] to sharing the common goal to operate the plant until a buyer could be found. The jury could infer from this goal and the defendants' knowledge of the plant's continuing problems with worker safety and environmental compliance that they reached a tacit agreement to operate the plant in violation of the environmental laws.

App. 43a.

The court of appeals granted petitioner's motion for a stay of the issuance of the mandate pending this Petition, implicitly concluding it would present "a substantial question." Fed. R. App. P. 41(d)(2)(A); Appendix C, App. 66a-67a.

REASONS FOR GRANTING THE PETITION

The Eleventh Circuit has upheld a shocking and unprecedented extension of the "responsible corporate officer" doctrine, first articulated by this Court in *Dotterweich* and *Park* for strict liability misdemeanor offenses, to the most serious felony environmental crimes. The decision further eroded the required standards for criminal liability of individual corporate officers by sustaining an intra-corporate "conspiracy" theory, predicated solely on standard business discussions among corporate executives dealing with a bankruptcy situation. The resulting standard is fraught with legal and policy implications; it not only will permit conviction of innocent individuals, but ultimately will deter participation in responsible corporate behavior essential to environmental compliance.

The importance of this case is manifest, presenting as it does questions concerning "a fundamental purpose of criminal justice, sorting out the innocent from the guilty before imposing punishment."[14] The court of appeals' decision runs seriously afoul of this Court's decisions relevant to the interpretation of federal criminal statutes, as well as the prohibition against judicial crime creation implicit in the Constitution's separation of powers, by expanding the statutory definitions of multiple crimes. The decision also creates a direct conflict within the courts of appeals as to the

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[14] *United States v. Weitzenhoff*, 35 F.3d 1275, 1293 (9th Cir. 1994) (Kleinfeld, J., dissenting from denial of rehearing *en banc*) ("Dilution of the traditional requirement of a criminal state of mind, and application of the criminal law to innocent conduct, reduces the moral authority of our system of criminal law."), *cert. denied*, 513 U.S. 1128 (1995).

proper application of the "responsible corporate officer" doctrine to environmental crimes.

I. THE CULPABILITY STANDARDS FOR ENVIRONMENTAL CRIMES SHOULD BE CLARIFIED

In *Dotterweich* and *Park*, this Court adopted the "responsible corporate officer" doctrine for a very limited category of strict liability, misdemeanor, "public welfare" statutes, under which criminal liability may be imposed "upon a person otherwise innocent but standing in responsible relation to a public danger." *Dotterweich*, 320 U.S. at 281. The statute interpreted in *Dotterweich* and *Park*—the Federal Food, Drug, and Cosmetic Act—itself "dispense[d] with the conventional requirement for criminal conduct—awareness of some wrongdoing." *Id.* The Court, however, has long resisted arguments to "expand the doctrine of crimes without intent" beyond minor public welfare offenses, *Morissette v. United States*, 342 U.S. 246, 260 (1952), and nothing in *Dotterweich* or *Park* would support expanding the doctrine to crimes for which Congress supplied heightened culpability requirements and lengthy prison sentences.

A. The Eleventh Circuit Upheld a Diminished *Mens Rea* Requirement for Corporate Officers.

The "responsible corporate officer" instruction eliminated the statutory *mens rea* not only for knowing endangerment (count 34), but also for the eleven lesser RCRA offenses (counts 22-33). A person violates RCRA if he "knowingly treats, stores, or disposes of any hazardous waste identified or listed under this subchapter" without a permit. 42 U.S.C. § 6928(d)(2)(A). This Court has held that the use of the word "knowingly" in a federal criminal statute requires "proof of knowledge of the facts that constitute the offense." *Bryan v. United States*, 524 U.S. 184, 193 (1998). *Cf. Staples v. United States*, 511 U.S. 600, 619 (1994) (interpreting implied statutory

knowledge element to require proof "that petitioner knew of the features of his AR-15 [gun] that brought it within the scope of the Act"); *Morissette*, 342 U.S. at 271 (interpreting implied statutory knowledge element to require proof that defendant "had knowledge of the facts . . . that made the taking a conversion"). Knowledge of such facts, if acquired after the fact, cannot suffice because of the required "concurrence of an evil-meaning mind with an evil-doing hand." *Id.* at 251. Thus, Section 6928(d)(2)(A) required proof that petitioner had knowledge of—and caused—the specific treatments, storage, and disposals of hazardous waste charged in counts 22-33, when each violation allegedly occurred.

The "responsible corporate officer" instruction required no knowledge of any particular facts constituting these offenses; it permitted the jury to convict only if petitioner "acted knowingly in failing to . . . *detect or correct* the violation." R22-200 (emphasis added). The concept of failure to *correct* a violation that, tautologically, had already occurred, allowed conviction even if the jury found that petitioner first acquired knowledge of the violation after its occurrence, as the district court concluded he did.[15] The concept also eliminated the *actus reus* of the offense, which required proof that he *caused* the violation, not that he failed to take corrective steps after it happened. Similarly, the concept of failure to *detect* a violation explicitly authorized conviction absent any knowledge at any point in time. Indeed, the concepts of "failure to detect" and actual knowledge would logically seem mutually exclusive.[16]

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[15] *E.g.*, R14-235-6 (Randall "was notified of these violations after the fact"); R14-235-13 (violations of the environmental permits "were done without [Randall's] prior consent or knowledge").

[16] To "knowingly fail to detect" a fact—whatever this means—is far removed from the concept of "willful blindness," which occurs when a person acts purposefully to shield himself from the truth. *See* Wayne R. LaFave and Austin W. Scott, Jr., *Criminal Law* § 3.5(b) (2d ed. 1986).

While the district court supplied an ersatz *mens rea* in the instruction (*i.e.*, "acted knowingly"), it elsewhere instructed the jury that, for each substantive count, the phrase "acted knowingly" meant only that a person "act[ed] intentionally and voluntarily, *realizing what he [was] doing*, and not because of ignorance, mistake, accident, or carelessness." R22-188 (emphasis added). For a person simply to "realiz[e] what he is doing" (*i.e.*, to be generally aware of the nature of his conduct) falls far short of an actual awareness of the circumstances and results of his conduct. Thus, the "responsible corporate officer" instruction replaced the statutory *mens rea* for all of the RCRA offenses with one that meant little more than "not sleepwalking."[17] Indeed, the government in its closing argument erroneously analogized the *mens rea* applicable to the charged CWA and RCRA offenses to the classic strict liability offense of speeding.[18]

Furthermore, "to ensure that the purpose to avoid learning the truth is culpable," *id.*, the Model Penal Code's formulation of willful blindness requires an "aware[ness] of a high probability of [the] existence" of the fact. American Law Institute, Model Penal Code § 2.02(7) (Proposed Official Draft 1962) (hereinafter "Model Penal Code").

[17] Due to the confusing manner in which the court instructed the jury, particularly the court's comment "wherever I have used the term 'corporate officers,' I mean responsible corporate officers," (R22-209), which the court made in passing literally moments before sending the jurors into the jury room to begin deliberations, the jury likely applied the instruction to all CWA as well as all RCRA counts.

[18] The government told the jury that the "knowing" requirement for the CWA and RCRA offenses was

> probably comparable to if we're driving 60 in a 30 zone and we have taken our eyes off of the speedometer and we're caught. We have done it knowingly. We're not doing it by some happenstance, thinking that we are in another situation. *We were driving.*

R21-160 (emphasis added).

B. The Error Was More Dramatic With Respect to the Knowing Endangerment Offense.

The starkest error in this case was in the "responsible corporate officer" instruction's application to knowing endangerment under RCRA. By statute, knowing endangerment occurs only if "a person who knowingly transports, treats, stores, disposes of, or exports any hazardous waste," in violation of 42 U.S.C. § 6928(d), also "knows at that time that he thereby places another person in imminent danger of death or serious bodily injury." 42 U.S.C. § 6928(e). To assure proper implementation of Section 6928(e), Congress took the rare step of codifying a version of the Model Penal Code's definition of knowledge solely for RCRA's knowing endangerment statute. *Compare* 42 U.S.C. § 6928(f)(1), *with* Model Penal Code § 2.02(2)(b).[19]

Congress also added clarifying provisions that expressly require proof of the defendant's actual knowledge "that his conduct placed another person in imminent danger of death or serious bodily injury," *see* 42 U.S.C. § 6928(f)(2)(A) (providing that a person can be held "responsible only for actual awareness or actual belief that he possessed"), *and* that expressly prohibit constructive knowledge as a predicate for liability. *Id.* at § 6928(f)(2)(B) (forbidding attribution to the defendant of "knowledge possessed by a person other than the defendant but not the defendant himself"). Congress deemed

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[19] The House Conference Report on the Solid Waste Disposal Act Amendments of 1980 states that the "basic definition" of "knowing" that now appears at 42 U.S.C. § 6928(f)(1) was "derived from the general definition of this mental element proposed in the Criminal Code Reform Act, S. 1722." H.R. Conf. Rep. No. 96-1444, at 39 (1980), *reprinted in* 1980 U.S.C.C.A.N. at 5038; S. 1722, 96th Cong., 1st Sess., § 302 (1979); Kenneth R. Feinberg, *Toward a New Approach to Proving Culpability: Mens Rea and the Proposed Federal Criminal Code*, 18 Am. Crim. L. Rev. 123, 129 (1980) ("S. 1722 replaces the confusing and inconsistent ad hoc approach to culpability that now characterizes federal criminal law with a new system that has its genesis in the Model Penal Code").

these provisions necessary to hone the jury's understanding of the *mens rea* required for conviction, and to protect corporate managers and officers from overreaching federal prosecutions:

> [T]he ultimate issue for the jury will be whether the defendant . . . was actually aware or actually believed that his conduct would create a danger described in subsection (e). . . . The conferees believe that these clarifying provisions are appropriate to accompany the creation of this new federal crime and are appropriate to protect persons engaged in complex decision-making from unjust indictment or conviction. . . . [R]esponsibility for the felony of criminal endangerment should properly be confined only to those persons who themselves have actual knowledge of the danger resulting from their conduct. *A supervisor, for example, who personally lacks the necessary knowledge, should not be criminally prosecuted for knowledge that only his subordinates possessed.*

H.R. Conf. Rep. No. 96-1444, at 39-40 (1980), *reprinted in* 1980 U.S.C.C.A.N. at 5039 (emphasis added).

Reflecting the Model Penal Code's definition of knowledge, Section 6928(f)(1) creates separate culpability requirements for each objective element (*i.e.*, conduct, attendant circumstances, and results) of the crime of knowing endangerment. *See* 42 U.S.C. § 6928(f)(1)(A)-(C).[20] Thus, with respect to a person's conduct, his state of mind is "knowing" if "he is aware of the nature of his conduct," *id.* § 6928(f)(1)(A); with respect to an existing circumstance, his state of mind is "knowing" if "he is aware or believes that the circumstance exists," *id.* § 6928(f)(1)(B); and with respect to the results of his conduct, his state of mind is "knowing" if

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[20] *See generally* Paul H. Robinson and Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 Stan. L. Rev. 681, 692-99 (1983) (knowledge under the Model Penal Code "is defined in relation to each objective element of the offense—i.e., conduct, attendant circumstances, or result").

"he is aware or believes that his conduct is substantially certain to cause danger of death or serious bodily injury." *Id.* § 6928(f)(1)(C).

The district court's "responsible corporate officer" instruction failed to require proof that petitioner had actual knowledge—*i.e.*, actual awareness or actual belief—of any existing circumstances or expected results of his conduct, as defined under Sections 6928(f)(1)(B)-(C) and clarified under Sections 6928(f)(2)(A)-(B). The instruction thus eviscerated the statutory *mens rea*. It permitted the jury to convict petitioner of knowing endangerment based only on a finding, at most, that he had a general awareness of the nature of his conduct within the meaning of Section 6928(f)(1)(A), ignoring entirely the additional required elements.

In its *per curiam* opinion the court of appeals never addressed the significant differences in these culpability requirements, cursorily upholding the instruction because it included the phrase "acted knowingly." Other courts, however, have recognized the distinction, particularly in state jurisdictions that have adopted versions of the Model Penal Code's culpability provisions. The Montana Supreme Court's decision in *State v. Lambert*, 929 P.2d 846 (Mont. 1996), which reversed a conviction for criminal endangerment under Montana law, is particularly apropos. In *Lambert*, the court considered jury instructions that defined "knowing" to mean *either* awareness of conduct, awareness of circumstances, *or* awareness that there was a high probability that conduct would cause a specific result. *Id.* at 848. Interpreting Montana's criminal endangerment statute as "emphasiz[ing] result over conduct," the court found these alternative instructions to be erroneous:

> [A] person may engage in a wide variety of conduct and still commit the offense of criminal endangerment, provided that the conduct creates a substantial risk of death or serious bodily harm. . . . There being no

> particularized conduct which gives rise to criminal endangerment, applying to that offense's mental element the definition of "knowingly" that an accused need only be aware of his conduct is incorrect. It is the appreciation of the probable risks to others posed by one's conduct that creates culpability for criminal endangerment; were it otherwise, where culpability could lie for mere appreciation of one's conduct, such as driving a car or shooting a hunting rifle, some very unfair results could follow.

Id. at 849. This reasoning applies with particular force to corporate officer liability in the environmental context.[21]

C. The Judicial Creation of New Crimes Violated Separation of Powers.

By approving the "responsible corporate officer" instruction, the court of appeals extended *Dotterweich* and *Park* to offenses charged under 42 U.S.C. §§ 6928(d)(2)(A) and (e) and dispensed with their explicit statutory *mens rea* requirements. Despite a clear command from Congress requiring a jury finding of actual knowledge for liability under RCRA, the district court's *mens rea* (to "act knowingly") ranged somewhere between strict liability and negligence, the standard of culpability ultimately created by *Dotterweich* and *Park*. *See Dotterweich*, 320 U.S. at 284 (permitting liability "though consciousness of wrongdoing be totally wanting"); *Park*, 421 U.S. at 679 (Stewart, J., dissenting) (characterizing the Court's opinion as employing "the language of negligence"). However, "[t]he spirit of the doctrine which denies to the federal judiciary power to create crimes forthrightly admonishes that we should not enlarge the reach of enacted crimes by constituting them from anything

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[21] *See also People v. Curtis*, 627 P.2d 734, 736-37 (Colo. 1981) (reversing conviction where "[t]he jury instruction on the culpability for extreme indifference murder was defective because it defined 'knowingly' with respect to conduct and circumstance, but not with respect to result.")

less than the incriminating components contemplated by the words used in the statute." *Morissette*, 342 U.S. at 263

The proceedings below thus magnify a separation-of-powers problem intrinsic to the "responsible corporate officer" doctrine. The power to define federal crimes belongs exclusively to Congress, *United States v. Hudson and Goodwin*, 11 U.S. (7 Cranch) 32 (1812); *United States v. Wiltberger*, 18 U.S. (5 Wheat) 76 (1820), thus implementing the principle of legality. *United States v. Lanier*, 520 U.S. 259, 265 n.5 (1997). Inherent in the judicial exercise of translating the statutory elements of a crime into a theory of liability specially tailored for corporate officers is a likelihood of frequent deviation from "the words used in the statute," *Morissette*, 342 U.S. at 263, and concomitant judicial crime creation. Even in *Dotterweich*, the doctrine's propensity for ad hoc judicial criminalization of corporate conduct influenced the dissent:

> [T]he fact that individual liability of corporate officers may be consistent with the policy and purpose of a public health and welfare measure does not authorize this Court to impose such liability where Congress has not clearly intended or actually done so. Congress alone has the power to define a crime and to specify the offenders. *United States v. Wiltberger*, 5 Wheat. 76, 95. It is not our function to supply any deficiencies in these respects, no matter how grave the consequences.

320 U.S. at 286-87 (Murphy, J., dissenting). The systemic risk of judicial crime creation resulting from the lower courts' haphazard attempts to adapt *Dotterweich* and *Park* to statutes with heightened, complicated culpability requirements, calls for clear guidance from this Court.

D. The Court of Appeals' Decision Conflicts with Decisions of the First, Fifth, and Ninth Circuits.

Absent a direct precedent from this Court, the lower courts have produced an unclear and fragmented body of case law concerning the application of the "responsible corporate

officer" and "public welfare" doctrines in environmental criminal cases. The *American Criminal Law Review* recently surveyed these decisions and concluded that "[t]he degree to which the responsible corporate officer doctrine eliminates the *mens rea* requirement of various environmental statutes is not well settled." Jason Blacksberg *et al.*, *Environmental Crimes*, 38 Am. Crim. L. Rev. 607, 617 (2001).[22] The decision in this case promises only to exacerbate this doctrinal indeterminacy, on a question that has grown in importance in recent years as "the EPA and the DOJ increasingly have targeted individual corporate officers, as well as corporations, for criminal enforcement actions." *Id.* at 618.

To the extent that coherent principles had begun to form, the overarching theme emerging from these cases (at least prior to the decision below) was that a "responsible corporate officer" instruction could not require proof of anything less than the statutory actual knowledge standard required for conviction under RCRA and CWA. *See United States v. MacDonald & Watson Waste Oil Company*, 933 F.2d 35 (1st Cir. 1991); *United States v. Iverson*, 162 F.3d 1015, 1026 (9th Cir. 1998). In *MacDonald & Watson*, the lower court gave an instruction that permitted a RCRA conviction if the corporate officer knew that "illegal activity of the type alleged occurred." 933 F.2d at 51. The First Circuit reversed the conviction because the instruction permitted the government to establish guilt by "simply establish[ing] that the defendant was a responsible corporate officer," which—like the instruction in this case—required proof of only "three things, none of which, individually or collectively, neces-

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[22] *See also* Brenda S. Hustis and John Y. Gotanda, *The Responsible Corporate Officer: Designated Felon or Legal Fiction?*, 25 Loy. U. Chi. L. J. 169, 184-85 (1994) (observing that "of those authorities that have advocated the extension of the RCO doctrine to [federal environmental] statutes, opinions are divided regarding the extent to which the RCO doctrine affects the statute's mens rea requirement.").

sarily established his actual knowledge of the illegal [transaction] charged." 933 F.2d at 53. Similarly, in *Iverson*, a CWA prosecution, the Ninth Circuit upheld a "responsible corporate officer" instruction, which included an explicit statement requiring proof that the defendant "had knowledge of the fact [of the violation charged]." 162 F.3d 1015, 1022. The court upheld the instruction only because "the government still had to prove . . . that the defendant knew that the discharges were pollutants." 162 F.3d 1015 at 1026.

The panel's opinion in this case also conflicts with the Fifth Circuit's opinion in *United States v. Ahmad*, 101 F.3d 386 (5th Cir. 1996), *reh'g denied*, 108 F.3d 335 (5th Cir. 1997), insofar as the court in this case approved an instruction erroneously derived from *Dotterweich* and *Park*, which turn on the precept that "public welfare" statutes may properly be implemented with reduced *mens rea* standards to further their public policy objectives. In *Ahmad*, the Fifth Circuit held that the CWA was not a public welfare statute, reversing the conviction because the jury was not instructed that the *mens rea* requirement applied to each element of the offense. 101 F.3d 386 at 391 (citing *Staples*, 511 U.S. at 607). *But cf. United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1994) (holding that CWA is a public welfare statute), *cert. denied*, 1513 U.S. 1128 (1995).

II. CRIMINAL LIABILITY FOR INTRA-CORPORATE "CONSPIRACIES" CONTRADICTS COURT PRECEDENT AND BASIC PRINCIPLES OF LAW

Since this Court's decision in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), the doctrine of intra-corporate conspiracy has been inconsistently applied in the circuit courts. In the nearly two decades since *Copperweld*, courts have largely rejected civil intra-corporate conspiratorial liability while perfunctorily approving intra-

corporate liability in criminal conspiracy cases. *See generally* Shaun P. Martin, *Intracorporate Conspiracies*, 50 Stan. L. Rev. 399 (1998) (comprehensively and critically examining the federal judicial response to the doctrine of intracorporate conspiracy). The Eleventh Circuit has long held that intra-corporate conduct satisfies the plurality requirement for conviction under 18 U.S.C. § 371. *See United States v. Hartley*, 678 F.2d 961, 968 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983).

As noted by recent legal scholarship, however, the refusal to apply the *Copperweld* reasoning to 18 U.S.C § 371 is erroneous and inconsistent with this Court's precedent and basic principles of law. Martin, *supra.*, 445-446. Moreover, the policy considerations underlying *Copperweld* are profoundly implicated in the environmental context.

A. The Circuit Courts Treat Intra-corporate Conspiracies Inconsistently.

In *Copperweld,* the Court held that "the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for the purposes of § 1 of the Sherman Act." *Copperweld*, 467 U.S. at 771. As a result, parent and subsidiary corporations were held to be legally incapable of conspiring with each other under Section 1. *Id.* at 777. This reasoning has been applied in federal civil conspiracy cases under statutes with language substantially similar to 18 U.S.C. § 371, such as 42 U.S.C. §§ 1985(2) and (3), both civil rights statutes requiring proof that "two or more persons . . . conspire . . . ." *See, e.g., Johnson v. Hills & Dales Gen. Hosp.*, 40 F.3d 837, 839-40 (6th Cir. 1994) (citing *Copperweld* and applying the intra-corporate conspiracy doctrine to find no conspiracy under Section 1985(3)); *Travis v. Gary Cmty. Mental Health Ctr.*, 921 F.2d 108, 109-111 (7th Cir. 1990) (same analysis in Section 1985(2) context); *Buschi v. Kirven*, 775 F.2d 1240, 1251-53 (4th Cir. 1985) (citing *Copperweld* and dismissing actions alleging conspir-

acy in violation of civil rights); *Doherty v. American Motors Corp.*, 728 F.2d 334, 339-40 (6th Cir. 1984) (finding no conspiracy under Section 1985(2) based on intra-corporate conspiracy doctrine). The circuit courts, however, have refused to apply the *Copperweld* approach in the criminal conspiracy context. *See, e.g., United States v. Ames Sintering Co.*, 927 F.2d 232, 236-37 (6th Cir. 1990) (upholding criminal intra-corporate conspiracy conviction by limiting *Copperweld* and its reasoning to the Sherman Act context despite its own and other circuits' application of *Copperweld* to non-antitrust civil conspiracy cases).

As this Court has noted, 18 U.S.C. § 371 "is the descendent of and bears a strong resemblance to conspiracy laws that have been in the federal statute books since 1867." *Tanner v. United States*, 483 U.S. 107, 128 (1987). However, "[n]either the original 1867 provision nor its subsequent reincarnations were accompanied by any particularly illuminating legislative history." *Id.* This Court has previously examined nineteenth-century common law to discern the legislative intent behind the federal criminal conspiracy statute. *See United States v. Dege*, 364 U.S. 51 (1960) (examining whether common law fiction of marital unity operated to prevent plurality for purposes of 18 U.S.C. § 371). In *Dege*, the Court presumed that Congress incorporated then-existing common law principles into the federal conspiracy statute, *see id.* at 54, consistent with well-settled principles of statutory interpretation. *See Morissette*, 342 U.S. at 263 (stating that when Congress codifies a preexisting legal concept the judiciary must assume, in the absence of contrary legislative instruction, that Congress meant to adopt the accumulated legal tradition and "cluster of ideas" attached to the concept).

At the time of the "Act of 1867," referenced by the Court in *Tanner* as the basis for the current federal conspiracy law at issue, wholly intra-corporate conduct failed to meet the

plurality requirement of conspiracy law.[23] The Seventh Circuit examined the history surrounding the enactment of the Civil Rights Act of 1871 with regard to intra-corporate conspiracy in *Travis*, 921 F.2d at 110. The court found that "[w]hen Congress drafted § 1985 [*i.e.*, the Civil Rights Act of 1871] it was understood that corporate employees acting to pursue the business of the firm could not be treated as conspirators." *Id.* The proposition that "the corporation and its managers are 'considered as one person in law'" is a long-standing principle and remains the prevailing common wisdom. *Id.* (quoting William Blackstone, 1 *Commentaries on the Laws of England* *456 (1st Ed. 1765) and citing 10 Fletcher *Cyclopedia of the Law of Private Corporations* § 4884 (Lenore M. Zajdel ed. 1986)). Similarly, when Congress passed the federal criminal conspiracy statute in 1867—just four years before the Civil Rights Act of 1871—intra-corporate conduct could not constitute a criminal conspiracy. *See* Martin, *supra* at 447-50. There is no indication in 18 U.S.C. § 371 that Congress intended to diverge from that long-held common law principle of corporate unity.

B. The Court Should Interpret Any Ambiguity in 18 U.S.C. § 371 in Favor of Lenity.

This Court has long held that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808, 812 (1971) (citing *Bell v. United States*, 349 U.S. 81, 83 (1955)). Because neither the statutory text, legislative history, nor common law principles support the notion that intra-corporate conduct satisfies the plurality requirement for a criminal conspiracy under 18 U.S.C. § 371, the Court should read the statute in favor of lenity to exclude liability for intra-corporate conduct.

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[23] Professor Martin's article comprehensively lays out this historical analysis. Martin, *supra*, at 447-50.

C. Public Policy Concerns Also Militate against Criminalizing Intra-corporate Communications Regarding Environmental Compliance.

In *Copperweld*, the Court expressed concern that coordination of a corporation's internal efforts was essential to effective competition—the public policy advanced by the antitrust laws—and that intra-corporate conspiratorial liability would stifle such coordinated competitive effort. *Copperweld*, 467 U.S. at 769. Similarly, if corporate officers believed that they could go to prison for discussing environmental compliance issues as they arise, the free exchange of information among dispersed corporate agents essential to achieve compliance with the environmental laws will be stifled. *Cf. Travis*, 921 F.2d at 111. The logic of *Copperweld* thus supports a policy-based reason for precluding liability for intra-corporate "conspiracies" in matters charging environmental crimes. Combined with the "responsible corporate officer" doctrine, the government's prosecution of an intra-corporate "conspiracy" has led to an expansive theory of vicarious individual liability, which will no doubt propagate unintended, inequitable, counterproductive results that defy fundamental notions of due process.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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